IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 119 OF 2005.

Dhiren Morarji Dedhia. ... Petitioner.

V/s.

1. Union of India,

2. The Customs & Excise Gold
(Control) Appellate Tribunal,

3. The Commissioner of Central
Excise, Mumbai-II,

4. The Additional Commissioner
of Central Excise, Mumbai-II ... Respondents.

D.H.Mehta with N.M.Shah for the petitioner.

Ms.N.V.Masurkar with A.C.Singh
for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, DJ.

DATED : 5th April, 2005.

P.C. :

. Rule, returnable forthwith. Taken up for hearing by consent of parties.

. This petition filed under Article 226 of the Constitution of India is directed against the orders dated 19th March, 2004, 10th August, 2004 and 20th September, 2004. By virtue of first order dated 19th March, 2004 the Customs Excise & Service Tax Appellate Tribunal ("Tribunal" for short) partly

allowed an application for waiver of pre-deposit subject to deposit of duty amount in the sum of Rs.7,26,543/- within eight weeks from the date of receipt of the order, and on such deposit; pre-deposit of penalty was waived, and recovery thereof was stayed pending disposal of the appeal. By virtue of the second order dated 10th August, 2004, an application seeking modification of the order dated 19th March, 2004, for the reasons stated in the order, came to be rejected. By virtue of the third order dated 20th September, 2004 the appeal came to be dismissed for non-compliance of the statutory requirement of section 35F of the Central Excise Act, 1944 ("Act" for short) as the appellant failed to furnish proof showing pre-deposit of Rs.7,26,543/- as directed by the Tribunal.

2. The learned counsel appearing for the petitioner while challenging the aforesaid orders submitted that the Bench of the Tribunal while hearing appeal on 20th December, 2002 had directed that the appeal filed by the petitioner as well as the appeal filed by the Revenue shall be kept for final hearing; as such the petitioner was under bonafide belief that the appeal would be finally

heard on merits without there being any order of pre-deposit. However, according to the petitioner, to his surprise the respondent No.2 passed an order directing pre-deposit in the sum of Rs.7,26,543/- behind his back.

3. The petitioner submits that the aforesaid order came to be passed without hearing the petitioner. Consequently, the petitioner thought it fit to apply for modification of the order dated 19th March, 2004 contending that the said order was passed in breach of principles of natural justice. However, this application did not find favour with the Tribunal, consequently, said application came to be rejected. Ultimately, appeal resulted in dismissal for non-compliance of statutory requirement of section 35F of the Act as stated hereinabove.

4. Mrs.Masurkar, Advocate is appearing for the respondents. No attempt is made to file counter to refute the contention raised in the petition that the order dated 19th March, 2004 was passed by the Bench of the Tribunal without hearing the petitioner. Therefore, there is no option left with us but to accept the statement made on behalf of the

petitioner that the order dated 19th March, 2004 was passed behind the back of the petitioner.

5. In the above backdrop, the petitioner has raised a question: "whether respondent No.2 was justified in passing the impugned orders directing deposit of the amount of penalty without considering the directions given by the Bench of the Tribunal on 20th December 2002?"

6. Having heard rival parties, it is not in dispute that both appeals were to be heard by the Tribunal on merits. At the same time is reasonable to presume that the application seeking stay or waiver of the pre-deposit must have been shown in the cause-list of the Tribunal on 19th March 2004. It was expected on the part of the applicant/ petitioner to appear before the Tribunal.

7. Apart from the above, it appears that there was also a notice issued by the Tribunal directing the petitioner to appear on 19th March, 2004 as the impugned order dated 19th March, 2004 states that "None appears for the applicants in spite of notice".

8. In the above circumstances, we do not find any justification on the part of the petitioner to contend that there was no notice and that the order dated 19th March, 2004 was passed behind the back of the petitioner. But at the same time material is also available on record to suggest that the appeal filed by the petitioner was to be heard with the appeal filed by the Revenue. If that be so, it appears to have led the petitioner to believe that pre-deposit has been dispensed with by the Tribunal.

9. Be that as it may, without going in to the aforesaid controversy, looking to the consensus between the parties, we set aside the order dated 19th March, 2004 subject to deposit of Rs.7,26,543/- with the Tribunal within a period of eight weeks from today. As consequence of this, orders dated 10th August, 2004 and 20th September, 2004 cannot survive. Therefore, these two orders are also quashed and set aside subject to deposit of aforesaid amount. Needless to mention that failure on the part of the petitioner to deposit Rs.7,26,543/- within a period of eight weeks from today; this petition shall be deemed to have been dismissed with costs. In the event of deposit as ordered herein; the appeal shall stand restored to

the file of the Tribunal. It would be open for the Tribunal to hear and dispose of the appeal along with the appeal filed by the Revenue on its own merits in accordance with law as expeditiously as possible.

10. Petition stands disposed of accordingly.

Rule made absolute with no order as to costs.

(J.P.Devadhar, J.) **(V.C.Daga, J.)**